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G.R. No. 233918 – FILIPINO SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, INC., *Petitioner*, **v. ANREY, INC.,** *Respondent.*

Promulgated:
August 9, 2022

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DISSENTING OPINION

LEONEN, *J.*:

The majority granted the Petition for Review on Certiorari filed by petitioner Filipino Society of Composers, Authors and Publishers, Inc., finding that respondent Anrey, Inc. committed copyright infringement when it played radios that broadcasted copyrighted music in its restaurants, without paying the necessary license fees demanded by petitioner.

I dissent.

The reception and amplification of radio transmissions in a public space should not be considered an infringement of the copyright over musical compositions, notwithstanding the public space's proprietor lacking license from the copyright holder.

I

Article XIV, Section 13 of the Constitution lays down the State's duty to protect its citizens' intellectual property and creations:

> SECTION 13. The State shall protect and secure the exclusive rights of scientists, inventors, artists, and other gifted citizens to their intellectual property and creations, particularly when beneficial to the people, for such period as may be provided by law.

This is reflected in Section 2 of Republic Act No. 8293, otherwise known as the Intellectual Property Code:

> SECTION 2. Declaration of State Policy. — The State recognizes that an effective intellectual and industrial property system is vital to the development of domestic and creative activity, facilitates transfer of technology, attracts foreign investments, and ensures market access for our

> products. It shall protect and secure the exclusive rights of scientists, inventors, artists and other gifted citizens to their intellectual property and creations, particularly when beneficial to the people, for such periods as provided in this Act.
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> The use of intellectual property bears a social function. To this end, the State shall promote the diffusion of knowledge and information for the promotion of national development and progress and the common good.
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> It is also the policy of the State to streamline administrative procedures of registering patents, trademarks and copyright, to liberalize the registration on the transfer of technology, and to enhance the enforcement of intellectual property rights in the Philippines.

Section 2 articulates what appears to be two conflicting goals of intellectual property protection. On one hand, a monopoly is granted to scientists, inventors, artists, and other gifted citizens for the exploitation and use of their intellectual property; on the other, the diffusion of intellectual property for the common good. Specifically, for copyright, the problem today "is how best to reconcile the interest of three groups—authors, who give expression to ideas; publishers, who disseminate ideas; and the members of the public, who use the ideas."[1]

However, the conflict may be more apparent than real. No work is truly created in a vacuum, and many created works are perched on the shoulders of giants. This is recognized in our intellectual property laws, in prior art[2] for patents and derivative works[3] in copyright.

A salutary goal of intellectual property protection is the promise to creators that, should they disclose their creations to the world, they will, for a term provided by law, exclusively benefit from their creations. And, when that

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1 WENWEI GUAN, THE ORIGIN OF COPYRIGHT: EXPRESSION AS KNOWING IN BEING AND COPYRIGHT ONTO-EPISTEMOLOGY 9 (2021) *citing* LYMAN R. PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 224–225 (1968).

2 INTELLECTUAL PROP. CODE, sec. 24 states:
SECTION 24. Prior Art. — Prior art shall consist of:
24.1. Everything which has been made available to the public anywhere in the world, before the filing date or the priority date of the application claiming the invention; and
24.2. The whole contents of an application for a patent, utility model, or industrial design registration, published in accordance with this Act, filed or effective in the Philippines, with a filing or priority date that is earlier than the filing or priority date of the application: Provided, That the application which has validly claimed the filing date of an earlier application under Section 31 of this Act, shall be prior art with effect as of the filing date of such earlier application: Provided, further, That the applicant or the inventor identified in both applications are not one and the same.

3 INTELLECTUAL PROP. CODE, sec. 173 states:
SECTION 173. Derivative Works. — 173.1. The following derivative works shall also be protected by copyright:
(a) Dramatizations, translations, adaptations, abridgments, arrangements, and other alterations of literary or artistic works; and
(b) Collections of literary, scholarly or artistic works, and compilations of data and other materials which are original by reason of the selection or coordination or arrangement of their contents.
173.2. The works referred to in paragraphs (a) and (b) of Subsection 173.1 shall be protected as new works: Provided, however, That such new work shall not affect the force of any subsisting copyright upon the original works employed or any part thereof, or be construed to imply any right to such use of the original works, or to secure or extend copyright in such original works.

term expires, the public may then freely enjoy those creations.[4] In *ABS-CBN Corporation v. Gozon*:[5]

> We look at the purpose of copyright in relation to criminal prosecutions requiring willfulness:
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> > Most importantly, in defining the contours of what it means to willfully infringe copyright for purposes of criminal liability, the courts should remember the ultimate aim of copyright. Copyright is not primarily about providing the strongest possible protection for copyright owners so that they have the highest possible incentive to create more works. The control given to copyright owners is only a means to an end: the promotion of knowledge and learning. Achieving that underlying goal of copyright law also requires access to copyrighted works and it requires permitting certain kinds of uses of copyrighted works without the permission of the copyright owner. While a particular defendant may appear to be deserving of criminal sanctions, the standard for determining willfulness should be set with reference to the larger goals of copyright embodied in the Constitution and the history of copyright in this country.
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> In addition, "[t]he essence of intellectual piracy should be essayed in conceptual terms in order to underscore its gravity by an appropriate understanding thereof. Infringement of a copyright is a trespass on a private domain owned and occupied by the owner of the copyright, and, therefore, protected by law, and infringement of copyright, or piracy, which is a synonymous term in this connection, consists in the doing by any person, without the consent of the owner of the copyright, of anything the sole right to do which is conferred by statute on the owner of the copyright."
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> Intellectual property rights, such as copyright and the neighboring right against rebroadcasting, establish an artificial and limited monopoly to reward creativity. Without these legally enforceable rights, creators will have extreme difficulty recovering their costs and capturing the surplus or profit of their works as reflected in their markets. This, in turn, is based on the theory that the possibility of gain due to creative work creates an incentive which may improve efficiency or simply enhance consumer welfare or utility. More creativity redounds to the public good.[6] (Citations omitted)

Copyright regulation should not be reduced to economic exercises by individuals. Intellectual creations may be property under our laws, but our Constitution recognizes the social function of the use of property and its contribution to the common good. Article XII, Section 6 states:

> SECTION 6. The use of property bears a social function, and all

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4 *ABS-CBN Broadcasting Corporation v. Philippine Multi-Media System, Inc.*, 596 Phil. 283 (2009) [Per J. Ynares-Santiago, Third Division].

5 755 Phil. 709 (2015) [Per J. Leonen, Second Division].

6 Id. at 773–774.

> economic agents shall contribute to the common good. Individuals and private groups, including corporations, cooperatives, and similar collective organizations, shall have the right to own, establish, and operate economic enterprises, subject to the duty of the State to promote distributive justice and to intervene when the common good so demands.

The "common good" in this provision applies equally to all property, including all intellectual property. The majority's assertions that, first, "[t]he simple nuances between the different kinds of intellectual creations show the inclination to afford protection to copyright, more than other forms"[7] and second, "copyright does not impact people's lives as much as patented inventions do[,]"[8] have no textual basis in our Constitution and our laws.

The Intellectual Property Code provides different kinds of protection depending on the intellectual property involved. The procedures, rights, and obligations are calibrated based on the characteristics of the specific intellectual property. For example, a patent's term is 20 years from filing date;[9] a copyright holder's rights last during their lifetime and 50 years after death;[10] and a trademark registration may be indefinitely renewable so long as certain conditions are met.[11] Copyright vests upon the moment of creation;[12] the acquisition of a letters patent or registered trademark involves application, publication, and approval with the Philippine Intellectual Property Office. These differences should not be interpreted to imply a hierarchy of protection, that the rights accorded to a copyright holder are superior to the rights of a patent or trademark holder, or vice versa, or that one may expect less equitable treatment when it comes to the enforcement of their respective rights.

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7 *Ponencia*, p. 14.

8 Id. at 15.

9 INTELLECTUAL PROP. CODE, as amended, sec. 54 states:
SECTION 54. Term of Patent. — The term of a patent shall be twenty (20) years from the filing date of the application.

10 INTELLECTUAL PROP. CODE, as amended, sec. 213 states:
SECTION 213. Term of Protection. — 213.1. Subject to the provisions of Subsections 213.2 to 213.5, the copyright in works under Sections 172 and 173 shall be protected during the life of the author and for fifty (50) years after his death. This rule also applies to posthumous works.
213.2. In case of works of joint authorship, the economic rights shall be protected during the life of the last surviving author and for fifty (50) years after his death.
213.3. In case of anonymous or pseudonymous works, the copyright shall be protected for fifty (50) years from the date on which the work was first lawfully published: Provided, That where, before the expiration of the said period, the author's identity is revealed or is no longer in doubt, the provisions of Subsections 213.1 and 213.2 shall apply, as the case may be: Provided, further, That such works if not published before shall be protected for fifty (50) years counted from the making of the work.
213.4. In case of works of applied art the protection shall be for a period of twenty-five (25) years from the date of making.
213.5. In case of photographic works, the protection shall be for fifty (50) years from publication of the work and, if unpublished, fifty (50) years from the making.
213.6. In case of audio-visual works including those produced by process analogous to photography or any process for making audio-visual recordings, the term shall be fifty (50) years from date of publication and, if unpublished, from the date of making.
However, the moral rights of an author have a different term (see Intellectual Property Code, sec. 198).

11 INTELLECTUAL PROP. CODE, secs. 145 and 146.

12 INTELLECTUAL PROP. CODE, subsec. 172.2 states:
172.2. Works are protected by the sole fact of their creation, irrespective of their mode or form of expression, as well as of their content, quality and purpose.

The same holds true for works that fall within the ambit of copyright. Categories of works are protected differently due to their characteristics. Our copyright law recognizes that written works are exploited in ways different from visual, musical, audiovisual works, and works of applied art; hence, certain provisions clarify how parts of the law will operate for that particular kind of work.[13] Nonetheless, all copyright holders can expect the same term of protection, exclusive economic rights, and access to remedies should there be an infringement of those rights.

Respectfully, it is reductive to assert that the common good is more easily comprehended in patents.[14] Copyright is profoundly intertwined with culture. Many, if not all, copyrighted works can and do shape identities of persons, groups, communities, and nations.[15] Copyright is not merely economic; it also embodies "discursive power—the right to create, and control, cultural meanings."[16] The State recognizes this not just with copyright law, but also with laws that promote and protect art,[17] literature,[18] culture workers,[19] and the preservation and development of national cultural heritage.[20] So-called "factual works" are part of the expression, speech, and the press explicitly protected in our Bill of Rights,[21] while artistic creations enjoy State patronage and constitute cultural treasures.[22] Neither our

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13 *See, e.g.*, authorship in Subsection 178.5, reproductions in Section 187, and reproduction rights over computer programs in Section 189.

14 *Ponencia*, pp. 14–15.

15 *See, e.g.*, CONST., art. XIV, secs. 16 and 17, which state:
SECTION 16. All the country's artistic and historic wealth constitutes the cultural treasure of the nation and shall be under the protection of the State which may regulate its disposition.
SECTION 17. The State shall recognize, respect, and protect the rights of indigenous cultural communities to preserve and develop their cultures, traditions, and institutions. It shall consider these rights in the formulation of national plans and policies.
In relation to Republic Act No. 8371 (1997), secs. 32 and 34, which state:
SECTION 32. *Community Intellectual rights.* ICCs/Ips have the right to practice and revitalize their own cultural traditions and cultures. The State shall preserve, protect and develop the past, present and future manifestations of their cultures as well as the right to the restitution of cultural, intellectual, religious, and spiritual property taken without their free and prior informed consent or in violation of their laws, traditions and customs.
SECTION 34. *Rights to Indigenous Knowledge Systems and Practices and to Develop Own Sciences and Technology.* ICCs/Ips are entitled to the recognition of the full ownership and control and protection of their cultural and intellectual rights. They shall have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, including derivatives of these resources, traditional medicines and health practices, vital medicinal plants, animals and minerals, indigenous knowledge systems and practices, knowledge of the properties of flora and fauna, oral traditions, literature, designs, and visual and performing arts.

16 Madhavi Sunder, *Intellectual Property and Identity Politics: Playing with Fire*, 4. J. GENDER RACE & JUST. 69, 70 (2000).

17 Republic Act No. 9105 (2001), Art Forgery Act of 2001; Republic Act No. 8492 (1998), National Museum Act of 1998.

18 Republic Act No. 8047 (1995). Book Publishing Industry Development Act.

19 Presidential Decree No. 208 (1973) grants certain privileges and honors to National Artists; Republic Act No. 7355 (1992), Manlilikha ng Bayan Act.

20 Republic Act No. 4165 (1964), An Act Creating the National Commission on Culture and Providing Funds Therefor.

21 CONST., art. III, sec. 4 states:
SECTION 4. No law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the government for redress of grievances.

22 CONST., art. XIV, secs. 14–16 state:

Constitution nor our laws intended to create discriminatory classifications of intellectual property based on some arbitrary metric of relative "value."

II

Petitioner has failed to prove that respondent had violated an economic right granted to a copyright holder.

Since copyright is a statutory right, the rights granted to copyright holders are limited by law.[23] No copyright holder has an unlimited monopoly over all forms of exploitation of their works.[24] In *Joaquin, Jr. v. Drilon*:[25]

> Copyright, in the strict sense of the term, is purely a statutory right. It is a new or independent right granted by the statute, and not simply a pre-existing right regulated by the statute. Being a statutory grant, the rights are only such as the statute confers, and may be obtained and enjoyed only with respect to the subjects and by the persons, and on terms and conditions specified in the statute.[26] (Citation omitted)

In Section 177, the Intellectual Property Code enumerates the exclusive rights of a copyright holder:

> SECTION 177. Copyright or Economic Rights. — Subject to the provisions of Chapter VIII, copyright or economic rights shall consist of the exclusive right to carry out, authorize or prevent the following acts:
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> 177.1. Reproduction of the work or substantial portion of the work;
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> 177.2. Dramatization, translation, adaptation, abridgment, arrangement or other transformation of the work;
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> 177.3. The first public distribution of the original and each copy of the work by sale or other forms of transfer of ownership;
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> 177.4. Rental of the original or a copy of an audiovisual or cinematographic work, a work embodied in a sound recording, a computer program, a compilation of data and other materials or a musical work in graphic form, irrespective of the ownership of the original or the copy which is the subject of the rental; (n)

SECTION 14. The State shall foster the preservation, enrichment, and dynamic evolution of a Filipino national culture based on the principle of unity in diversity in a climate of free artistic and intellectual expression.

SECTION 15. Arts and letters shall enjoy the patronage of the State. The State shall conserve, promote, and popularize the nation's historical and cultural heritage and resources, as well as artistic creations.

23 See *Columbia Pictures, Inc. v. Court of Appeals*, 329 Phil. 875 (1996) [Per J. Regalado, En Banc].

24 Jane C. Ginsburg, *Copyright and Control over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1616 (2001).

25 361 Phil. 900 (1999) [Per J. Mendoza, Second Division].

26 Id. at 914.

> 177.5. Public display of the original or a copy of the work;
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> 177.6. Public performance of the work; and
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> 177.7. Other communication to the public of the work.

These rights are distinct from each other, as shown by the definitions of some of the acts in Section 171, including "communication to the public," "public performance," "rental," and "reproduction."

The exact right infringed is an essential determination in any copyright infringement case; otherwise, the defendant cannot raise the adequate defenses necessary to rebut the infringement claims. Moreover, plaintiffs and complainants should not be allowed to take a "shotgun" approach in their allegations; they must with certainty and specificity describe the alleged infringing act relative to one of the copyright holder's enumerated rights, appropriate to the type of copyrighted work allegedly infringed.

Here, petitioner alleges that the economic right violated by respondent is the right of "public performance of the work," as defined in Subsection 171.6:[27]

> 171.6. "Public performance", in the case of a work other than an audiovisual work, is the recitation, playing, dancing, acting or otherwise performing the work, either directly or by means of any device or process; in the case of an audiovisual work, the showing of its images in sequence and the making of the sounds accompanying it audible; and, in the case of a sound recording, making the recorded sounds audible at a place or at places where persons outside the normal circle of a family and that family's closest social acquaintances are or can be present, irrespective of whether they are or can be present at the same place and at the same time, or at different places and/or at different times, and where the performance can be perceived without the need for communication within the meaning of Subsection 171.3[.]

To be clear, the works allegedly infringed in this case are not sound recordings, but musical compositions. The Intellectual Property Code separates the copyright over the composition and the sound recording in which a performance of the composition is fixated. The law provides for the concept of "fixation" of performances of musical compositions in sound recordings:

> SECTION 202. Definitions. — For the purpose of this Act, the following terms shall have the following meanings:
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> . . . .
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> 202.2. "Sound recording" means the fixation of the sounds of a

[27] Because the alleged infringing acts were committed in 2008, the governing law is Republic Act No. 8293 (1997), prior to the amendments introduced by Republic Act No. 10372 in 2013.

> performance or of other sounds, or representation of sound, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work;
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> . . . .
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> 202.4. "Fixation" means the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device.

Fixations of sounds in the form of sound recordings[28] are governed by Chapters XII and XIII of the Intellectual Property Code, which provide for performers' rights, the moral rights of performers, and the rights of producers of sound recordings. One exclusive right of performers is to authorize the broadcasting or communication of their performance to the public,[29] while producers have the exclusive right to authorize the communication of the sound recording in a like manner as Subsection 171.3.[30] When a sound recording is used directly for broadcasting or other communication to the public, then the performer and producer are entitled to compensation:

> SECTION 209. *Communication to the Public.* — If a sound recording published for commercial purposes, or a reproduction of such sound recording, is used directly for broadcasting or for other communication to the public, or is publicly performed with the intention of making and enhancing profit, a single equitable remuneration for the performer or performers, and the producer of the sound recording shall be paid by the user to both the performers and the producer, who, in the absence of any agreement shall share equally.

By its own admission, petitioner represents "composers, lyricists, and music publishers."[31] Those composers, lyricists, and music publishers hold the copyright to the musical compositions only. Unless they are also the performers of the compositions, they do not hold the rights to the sound recordings where performances of their compositions are fixed.

The performance of a musical composition is typically executed using human artists, either directly with voices, or by means of instruments or other devices that represent or interpret the composition. One example of a "public

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28 Chapter XII also governs other audiovisual performances of literary and artistic works.

29 INTELLECTUAL PROP. CODE, as amended, subsec. 203.1 states:
SECTION 203. *Scope of Performers' Rights.* – Subject to the provisions of Section 212, performers shall enjoy the following exclusive rights:
203.1. As regards their performances, the right of authorizing:
(a) The broadcasting and other communication to the public of their performance; ...

30 INTELLECTUAL PROP. CODE, as amended, subsec. 208.4 states:
SECTION 208. *Scope of Right.* — Subject to the provisions of Section 212, producers of sound recordings shall enjoy the following exclusive rights:
. . . .
208.4. The right to authorize the making to the public of their sound recordings in such a way that members of the public may access the sound recording from a place and at a time individually chosen or selected by them, as well as other transmissions of a sound recording with like effect.

31 *Ponencia*, p. 8.

performance" of a musical composition is *Filipino Society of Composers, Authors and Publishers, Inc. v. Tan*,[32] where the respondent hired a combo of professional singers to play and sing certain musical compositions inside his restaurant. Fixation of the performance may or may not take place. On the other hand, the public performance of a sound recording requires the fixation or embodiment of the sound to "[make] the recorded sounds audible" as stated in Subsection 171.6.

Thus, the clause in Subsection 171.6 pertaining to sound recordings does not apply when the alleged infringed work is a musical composition not embodied in a sound recording, unless the copyright holder can allege and prove that they also hold the copyright over the sound recordings. And even if, regardless of ownership of the two, the act of publicly performing a sound recording constitutes a public performance of the underlying musical composition, then the clause in Subsection 171.6 must be directed to the entity that actively made the recorded sounds audible to the public, as defined in the clause.

Even then, the entirety of this final clause must be considered. A sound recording and its underlying musical composition must be publicly performed in a manner that excludes the need for communication described in Subsection 171.3—that is, by wire or wireless means in such a way that members of the public may individually decide the time and place of their access.

The sound recording clause in Subsection 171.6 is a series of conditions, all of which must be met for the act to be considered a public performance. The absence of even one condition must mean that either a different right has been infringed, or no right has been infringed at all.

In this case, respondent's acts are not within the scope of a "public performance" of a musical composition. It and its employees did not perform the musical compositions either directly, using the human voice, or through devices such as musical instruments, or a combination of both. It was not in any way involved in the performances of the musical compositions, and a subsequent embodiment of the performances in sound recordings. It did not create the broadcast programming in which the sound recordings were included. It did not transmit the radio waves in which the programming was contained. Apart from the radio device itself and perhaps some rudimentary amplification, it did not introduce further processing into the radio waves that it received. At the very least, the use of wire or wireless means, as will be discussed below, precludes respondent's acts from coverage under Subsection 171.6.

Likewise, I disagree with the majority's findings that respondent committed "an unauthorized communication of [the] copyrighted music to the

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[32] 232 Phil. 426 (1987) [Per J. Paras, Second Division].

public[.]"[33] Subsection 171.3 of the Intellectual Property Code as amended, defines what "communication to the public" is:

> 171.3. "Communication to the public" or "communicate to the public" means... the making of a work available to the public by wire or wireless means in such a way that members of the public may access these works from a place and time individually chosen by them[.]

For there to be a communication to the public, the person must be the one that made the work available to the public by wire or wireless means. Moreover, it should be available in a way that members of the public may access the works from a place and time they individually chose.

In this case, the entity that made the musical compositions available to the public in the way described in Subsection 171.3 is not respondent, but the radio station or stations—the broadcaster—that transmitted the sound recordings in which the performances of the compositions were fixed. respondent was merely a "member of the public," able to access the work at a chosen place—the restaurant—and time.

Notably, petitioner has executed agreements with entities for the collection of royalty payments for the use of its members' works. One such entity is the Kapisanan ng mga Brodkaster ng Pilipinas,[34] a nongovernment, nonprofit organization for broadcast media of television and radio.[35] The license serves as a form of permission, where the broadcaster compensates the composer after being allowed to exercise the composer's rights to exclusively communicate their work to the public.[36] Compensation is determined by the number of compositions played within a certain period of time,[37] with the broadcaster reporting its usage[38] and petitioner doing its own monitoring.

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33 *Ponencia*, p. 19.

34 ABS-CBN News, *KBP, FILSCAP agree to boost the music industry*, ABS-CBN NEWS, February 4, 2012, *available at* <https://news.abs-cbn.com/lifestyle/02/03/12/kbp-filscap-agree-boost-local-music-industry> (last accessed on August 7, 2022); Amy R. Remo, *Filipino artists forge pacts to collect copyright dues*, INQUIRER.NET, July 3, 2013, *available at* <https://business.inquirer.net/130111/filipino-artists-forge-pacts-to-collect-copyright-dues> (last accessed on August 7, 2022).

35 Kapisanan ng mga Brodkaster ng Pilipinas, *About KBP*, KBP WEBSITE, *available at* <https://www.kbp.org.ph/about-kbp> (last accessed on August 7, 2022).

36 *See* INTELLECTUAL PROP. CODE, as amended, subsec. 180.1, which states:
SECTION 180. *Rights of Assignee of Licensee.* — 180.1. The copyright may be assigned or licensed in whole or in part. Within the scope of the assignment or license, the assignee or licensee is entitled to all the rights and remedies which the assignor or licensor had with respect to the copyright.

37 *See, e.g.*, Filipino Society for Composers, Authors, and Publishers, *Rates for Radio Broadcast (KBP Member)*, KBP WEBSITE, *available at* <https://filscap.org/wp-content/uploads/2020/04/FILSCAP-Industry-Rate-for-KBP-2015-2019.pdf> (last accessed on August 7, 2022).

38 INTELLECTUAL PROP. CODE, as amended, subsec. 180.5 states:
180.5. The copyright owner has the right to regular statements of accounts from the assignee or the licensee with regard to assigned or licensed work.
See, e.g., Filipino Society for Composers, Authors, and Publishers, *Filscap License Application Form: Radio Broadcast*, FILSCAP WEBSITE, *available at* https://filscap.org/wp-content/uploads/2020/06/Application-Form-for-Radio-Broadcast.pdf> (last accessed on August 7, 2022).

If the broadcaster's use of the musical compositions is unlicensed, then the broadcaster should be made liable for infringing the composer's right to exclusively communicate their work to the public. Members of the public may also be liable under the Intellectual Property Code, as amended, if they benefited from the broadcaster's direct infringement, provided that they had notice of the infringing activity and the right and ability to control the direct infringer's activities,[39] and the secondary infringement was committed after the pertinent amendments to the Code.

If the broadcaster's use of the musical compositions is with a license, then the license's terms must be examined to determine the metes and bounds of the sanctioned use. If the use exceeds the stipulated bounds, then the broadcaster should be made liable for breach of contract, or in the case of a Kapisanan ng mga Brodkaster ng Pilipinas member, memorandum of agreement.

Meanwhile, the relationship between a broadcaster and its listener is one of medium and audience. The radio-listening public, as audience, can choose the time or place when they receive the broadcast, and on what device and at a volume of their preference. However, they generally have no input on what particular musical compositions or sound recordings are being played unless the station solicits requests—and even then, the request is only a suggestion that a station may accept or ignore. For commercial private stations, audiences are also recipients of advertising used to fund operations, while simultaneously being "products" sold to advertisers to entice them to place commercials as part of the stations' programming.[40]

But here, the crux of the matter is the legal tie between the copyright holder and the recipient of electromagnetic wavelengths—radio waves—transmitted by the broadcaster. Certainly, it cannot be based on the contract between the composer (or the composer's representative) and the broadcaster. In our civil law, only parties to a contract are bound to it, unless privity is proved.[41] Here, no privity is alleged, much less established. There is no claim

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[39] INTELLECTUAL PROP. CODE, as amended, sec. 216(b) states:
SECTION 216. *Infringement.* — Any person infringes a right protected under this Act when one:
. . . .
(b) Benefits from the infringing activity of another person who commits an infringement if the person benefiting has been given notice of the infringing activity and has the right and ability to control the activities of the other person[.]

[40] Ernesto I. Songco, *Broadcasting in the Philippines involvement in development*, MEDIA ASIA 214, 216 (1978); Elizabeth L. Enriquez et al., *Voices of a Nation: Radio in the Philippines*, *in* THE PALGRAVE HANDBOOK OF GLOBAL RADIO 275, 284–285 (2012).

[41] CIVIL CODE, art. 1311 states:
ARTICLE 1311. Contracts take effect only between the parties, their assigns and heirs, except in case where the rights and obligations arising from the contract are not transmissible by their nature, or by stipulation or by provision of law. The heir is not liable beyond the value of the property he received from the decedent.
If a contract should contain some stipulation in favor of a third person, he may demand its fulfillment provided he communicated his acceptance to the obligor before its revocation. A mere incidental benefit or interest of a person is not sufficient. The contracting parties must have clearly and deliberately conferred a favor upon a third person.

that any broadcaster exceeded the terms of use of the musical compositions it included in its programming. The broadcaster that facilitated the transmission of the compositions to respondent is not even a party to this case.

In essence, petitioner alleges that, when respondent's employees used a radio receiver for its usual and intended purpose—to receive electromagnetic wavelengths—and amplified free-to-air programming from a broadcaster within respondent's establishments, and that programming happened to include musical compositions, respondent committed copyright infringement, regardless of the existence and terms of a valid license granted to that broadcaster. What the majority does here is frame the acts of lawfully receiving and amplifying transmitted radio waves as an exploitation of a work that the copyright holder can control.

Respondent's acts should be differentiated from infringing acts such as "interception without authority," which involves the unauthorized capture of satellite signals, or "free transmission," which is the exhibition of infringing materials.[42] Respondent was not alleged to have unlawfully intercepted the signals being transmitted by the broadcaster. The facts also do not show that the programming itself contained infringing materials such as unauthorized fixations of performances of the musical compositions.

The Intellectual Property Code takes great pains to create nuances in copyright law, with due regard for the complexities of the modes of creation and distribution of original intellectual creations in the literary and artistic domain, that should not be hastily collapsed.

Here, due to the characteristics of the copyrighted works relative to the rights that may be exercised, respondent's alleged infringing acts are not a public performance or a communication to the public, as contemplated in the Intellectual Property Code. Further, no other exclusive right enumerated in Section 171 was alleged to have been infringed. Therefore, this Court must find that no copyright infringement had taken place in this case. Copyright holders must not be allowed to extend the scope of protection to their works beyond the statutory rights granted to them, and courts should be wary should they attempt to do so.

III

To arrive at its conclusions regarding the scope of public performance, the majority heavily relies[43] on United States copyright caselaw, namely, the cases of *Buck v. Jewell-LaSalle Realty, Co.*,[44] *Twentieth Century Music*

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42 *See* Rico V. Domingo, *Piracy and its Effects on the Film Industry*, 13 WORLD BULL. 137, 139 (1997).
43 *Ponencia*, pp. 16–18.
44 283 U.S. 191 (1931).

Corporation v. Aiken,[45] and *Broadcast Music, Inc. v. Claire's Boutiques, Inc.*,[46] based on the rationalization that United States copyright law defines "public performance" similarly as Philippine law.[47] Hence, the majority essentially says that the Philippine Legislature's intent when it passed the Intellectual Property Code may be derived from foreign jurisprudence.[48]

This rationalization is unsupported by a textual reading of the Intellectual Property Code.

Those American cases were decided based on the United States' copyright laws: the Copyright Act of 1909, and Title 17 of the United States Code, as amended, pursuant to Article I, Section 8 of the United States Constitution.[49] These copyright laws include public performance rights; however, the definition of public performance is substantially different from the one in the Intellectual Property Code. Mechanical licensing over musical compositions in the Copyright Act of 1909 is extensive in ways not found in our Intellectual Property Code:

> That any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right: . . .
>
> . . . .
>
> e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit; and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced: Provided, That the provisions of this Act, so far as they secure copyright controlling the parts of instruments serving to reproduce mechanically the musical work, shall include only compositions published and copyrighted after this Act goes into effect, . . . And provided further, and as a condition of extending the copyright control to such mechanical reproductions, That whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of two cents on each such part manufactured, to be paid by the manufacturer thereof; and the copyright proprietor may require, and if so the manufacturer shall furnish, a report under oath on the twentieth day of each month on the number of parts of instruments manufactured during the previous month serving to reproduce mechanically said musical

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45 422 U.S. 151 (1975).

46 949 F.2d 1482 (1991). It must also be pointed out that this case is not a case of the United States Supreme Court, but that of the United States Court of Appeals, Seventh Circuit.

47 *Ponencia*, p. 18.

48 Id.

49 U.S. CONST., art. I, sec. 8 states:
Section 8. The Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]

> work, and royalties shall be due on the parts manufactured during any month upon the twentieth of the next succeeding month. The payment of the royalty provided for by this section shall free the articles or devices for which such royalty has been paid from further contribution to the copyright except in case of public performance for profit[.]

As early as 1976, public performance was defined in Title 17, Section 101 of the United States Code:

> To perform or display a work "publicly" means-
>
> (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
>
> (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

While the definition above has superficial similarities with Subsection 171.6 of the Intellectual Property Code, the latter has clear clauses referring to specific types of works, which are relevant to this case, as I have earlier discussed. The United States caselaw relies heavily on the legislative history and intent of the United States Congress in the development of its domestic copyright law, especially *Broadcast Music*, which opinion devoted a significant portion of its discussion on legislative pushback to the ruling in *Twentieth Century Music*. Notably, United States copyright law also does not differentiate between public performance rights and the right to communicate the work to the public, as Philippine laws do.

To emphasize, copyright is a statutory right, the extent of which is defined in the relevant law. In the Philippines, the relevant law is the Intellectual Property Code and other existing Philippine laws. The Intellectual Property Code has provisions that are not in United States copyright law, and those provisions—being part of our legal system—requires our consideration. Our Legislature saw fit to distinguish between public performances and communications to the public, giving them specific definitions. We cannot merely say that the most relevant right is the right to public performance, when our copyright law defines other rights absent in American statute. Otherwise, our laws, and by extension, our courts, will be beholden to interpretations made of foreign laws, by foreign bodies, ignoring the real and material divergences in the legal, political, social, and cultural developments unique to each jurisdiction.

Even if the cases cited by the majority may serve as a basis to guide this Court's interpretation of Subsection 171.6 of the Intellectual Property Code,

the factual antecedents of both *Buck* and *Broadcast Music* do not squarely align with the facts in this case. The use of the musical composition in *Buck* was unlicensed not just by the hotel proprietor, but also by the radio station from which the hotel obtained its performances:

> Among the programs received are those transmitted by Wilson Duncan, who operates a duly licensed commercial broadcasting station in the same city. Duncan selects his own programs and broadcasts them for profit. There is no arrangement of any kind between him and the hotel. *Both were notified by the plaintiff society of the existence of its copyrights, and were advised that, unless a license were obtained, performance of any copyrighted musical composition owned by its members was forbidden.* Thereafter a copyrighted popular song, owned by the plaintiffs, was repeatedly broadcast by Duncan, and was received by the hotel company and made available to its guests.[50] (Emphasis supplied)

Here, it was not shown that the broadcasts that respondent allegedly performed in public similarly contained unlicensed performances of any musical compositions.

Moreover, both *Buck* and *Broadcast Music* did not involve the reception of transmitted radio waves using a single receiver and rudimentary amplification. In *Buck*, the "public performance" by the hotel proprietor involved "a master radio receiving set which is wired to each of the public and private rooms[,]"and "loudspeakers or headphones" were made available to guests so that they can listen to the performances "throughout the building."[51] Meanwhile, a network of "at least 669 receivers and 1,338 speakers"[52] across 749 stores[53] were the subject of *Broadcast Music*.

Comparisons[54] to the European Union case of *Phonographic Performance (Ireland), Ltd. v. Ireland*[55] and England and Wales Court of Appeal-Civil Division case of *TuneIn, Inc. v. Warner Music UK, Ltd. & Anor*[56] are also inapt. *Phonographic Performance*, similar to *Buck*, involved the transmission of sound recordings taken from a central receiver and distributed throughout the bedrooms of a hotel.[57] *TuneIn* concerned Internet radio, a medium that functions wholly differently from terrestrial radio—a fact made clear in the opinion[58]—and a different regulatory framework, with its own

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50 *Buck v. Jewell-LaSalle Realty, Co.*, 283 U.S. 191, 195 (1931).
51 Id.
52 949 F.2d 1482, 1485 (7th Cir. 1991).
53 Id. at 1484-1485.
54 *Ponencia*, pp. 25–26.
55 [2012] EUECJ C-162/10.
56 [2021] EWCA Civ 441.
57 *Phonographic Performance (Ireland), Ltd. v. Ireland* [2012] EUECJ C-162/10, pars. 18-22.
58 *TuneIn Inc. v. Warner Music UK, Ltd. & Anor* [2021] EWCA Civ 441, par. 6 states, "A traditional radio station (i.e. a radio station broadcasting by radio waves using FM, AM etc.) which wishes to play recorded music to its listeners needs a licence from the Claimants if the music is within the Claimants' repertoire. One source of these licences in the UK is the collecting society Phonographic Performance Ltd ("PPL"). Today radio stations are available on the internet. That includes "simulcasts" and

particularities too premature to be discussed at this juncture.

All of those cases are in stark contrast with methods by which respondent allegedly publicly performed the musical compositions. The majority has not shown how the disparate facts could be reconciled to arrive at the same conclusions.

Similarly, the majority's use of the texts produced by the World Intellectual Property Organization to interpret provisions of the Intellectual Property Code[59] is highly irregular. In our constitutional order, the task of interpreting Philippine laws is part of judicial power vested in this Court and other courts as may be provided by law.[60]

There may be instances when the opinions of a body tasked to administer a treaty are relevant, but only insofar as that opinion is about that treaty. The World Intellectual Property Office's opinions on the Berne Convention may have persuasive effect in our understanding of the Berne Convention, but they cannot be said to have persuasive or moral effect on our interpretation of the Intellectual Property Code.

Article 11 of the Berne Convention does state that authors of musical works have the exclusive right to authorize the public performance and any communication to the public of the performance of their works.[61] However, this must be read in conjunction with Article 11bis, which states that the

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"webcasts". The internet signal is received as a stream by the listener. A simulcaster is a traditional radio station which also simultaneously transmits its signal over the internet. A webcaster simply transmits its signal over the internet and does not also broadcast by radio waves. These can be referred to together as internet radio stations. They may also require a licence if they are going to play the relevant music recordings, depending on the applicable law."

59 *Ponencia*, p. 20 states: "As one of the signatories to the convention establishing the WIPO, the WIPO guidance has a persuasive or moral effect in the interpretation of our intellectual property laws." The *ponencia* cites not the World Intellectual Property Office itself, but a committee under it with a mandate specific to genetic resources, traditional knowledge, and traditional cultural expressions. *See* Assembly of the Member States of WIPO, *Report of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, Sixty-Second Series of Meetings, October 4 to 8, 2021, available at <https://www.wipo.int/export/sites/www/tk/en/documents/pdf/igc-mandate-2022-2023.pdf> (last accessed on August 7, 2022).

60 CONST., art. VIII, sec. 1 states:
SECTION 1. The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.
Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.

61 Berne Convention, art. 11 states:
Article 11
Certain Rights in Dramatic and Musical Works:
1. Right of public performance and of communication to the public of a performance;
2. In respect of translations
(1) Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing:
(i) the public performance of their works, including such public performance by any means or process;
(ii) any communication to the public of the performance of their works.
(2) Authors of dramatic or dramatico-musical works shall enjoy, during the full term of their rights in the original works, the same rights with respect to translations thereof.

contracting states determine in domestic law the conditions under which the rights of composers to authorize broadcasting rights may be exercised:

> Article 11bis
> Broadcasting and Related Rights:
> 1. Broadcasting and other wireless communications, public communication of broadcast by wire or rebroadcast, public communication of broadcast by loudspeaker or analogous instruments;
> 2. Compulsory licenses; 3. Recording; ephemeral recordings
>
> (1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing:
>
> (i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;
>
> (ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one;
>
> (iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.
>
> (2) *It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed.* They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.
>
> (3) In the absence of any contrary stipulation, permission granted in accordance with paragraph (1) of this Article shall not imply permission to record, by means of instruments recording sounds or images, the work broadcast. *It shall, however, be a matter for legislation in the countries of the Union to determine the regulations for ephemeral recordings made by a broadcasting organization by means of its own facilities and used for its own broadcasts. The preservation of these recordings in official archives may, on the ground of their exceptional documentary character, be authorized by such legislation.* (Emphasis supplied)

The World Intellectual Property Office may opine whether our domestic laws are aligned with our treaty obligations. However, that is for our Legislature to heed when it sees fit to amend or repeal any provision in the Intellectual Property Code or any other law governing intellectual property rights. Courts can also consider the World Intellectual Property Office's opinions when they interpret our treaty obligations vis-à-vis domestic law. But their guidance, unanchored to specific treaty obligations, cannot bind this Court's interpretation of domestic law. Our accession to the Berne Convention did not bestow upon the World Intellectual Property Office any

vestige of judicial power.

IV

Radio is a medium for mass communication, enjoyed both in private households and public parks. "Radio signals then and now do not respect political and cultural boundaries—radio signals may and do cross the imagined boundaries of nation and country."[62] The ubiquity of radio comes both from the low barriers to access radio frequencies,[63] and the historical use of Filipino languages in radio broadcasting. The flexible nature of the medium, as well as its distribution and scale, makes it a "democratic" medium that extends throughout the archipelago,[64] especially to demographics for whom mass media could be otherwise inaccessible.[65] Radio has been described as "part of Filipino culture":[66]

> Perhaps no other media channel has touched the lives of ordinary Filipinos as much as the radio. From the traditional panawagans during personal tragedies or natural disasters, the tearjerkers of Tiya Dely Magpayo, knowledge power of Ernie Baron, eccentric health advises from Johnny Midnight and of course, the most requested songs in pop music radio stations.
>
> But the power of radio is best dramatized during the 1986 People Power Revolution. This historic event, which led to the overthrow of the Marcos dictatorship, was given impetus with an appeal from Jaime Cardinal Sin Archbishop, of Manila, aired over Radio Veritas, a Catholic radio station, asking freedom loving Filipinos to support then Gen. Fidel V. Ramos and then Defense Minister Juan Ponce Enrile. In response, millions of Filipinos took over EDSA for four days. Millions of Filipinos all over the country followed the developments of the historic event from the clandestine Radyo Bandido anchored by women broadcaster June Keithley.

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62 Elizabeth L. Enriquez, APPROPRIATION OF COLONIAL BROADCASTING: A HISTORY OF EARLY RADIO IN THE PHILIPPINES, 1922–1946 21 (2008).

63 *See* John A. Lent, *Philippine Radio – History and Problems*, in ASIAN STUDIES (1968), which discussed how radio was accessible regardless of geography ("In a nation made up of 7,000 islands, a medium is needed that can reach anywhere. So far, radio is the only one capable of this." Id. at 52), wealth ("Barrio (small village) folk, traditionally isolated from the outside world, now absorb fresh ideas and keep abreast of national and international developments through transistor[] [radios]. . . . Why the great emphasis placed on the transistor? What was wrong with the battery or electric radios? First of all, many barrios in the Philippines do not have electricity[,] and those having electricity still think of it as a luxury to be used sparingly. In addition, battery radios are prohibitively costly (because of the short life of the expensive batteries) and cumbersome." Id. at 37), and educational attainment ("Why do provincial cities have so many radio stations as compared to the number of newspapers? Reuben Canoy, Cagayan de Oro City pioneer in radio, explained that radio is easier to organi[ze] than newspapers. He added: 'You can get ads for radio and also there is not the need for as many staff members as newspapers. Of course, people who can't read can listen.'" Id. at 44–45).

64 Resil B. Mojares, *Taking Politics: The Komentaryo on Cebu Radio*, 26 PHILIPPINE QUARTERLY OF CULTURE AND SOCIETY NO. 3/4 337, 338 (1998).

65 *See* Carlos Arnaldo, *The Electronic Information Media in the Second Decade of Development*, 19 PHIL. STUD. NO. 2 420, 420 (1971), which states, "The advent of the transistor in the Sixties proliferated the pocket-size radio throughout the country ten times faster than the nation's already high birth rate. Radio quickly became the poorman's newspaper, drama theatre, and jukebox."

66 Ramon R. Tuazon, *Radio as a way of life*, NATIONAL COMMISSION ON CULTURE AND ARTS, *available at* <https://ncca.gov.ph/about-ncca-3/subcommissions/subcommission-on-cultural-disseminationscd/communication/radio-as-a-way-of-life/> (last accessed on August 7, 2022).

> Radio is more than just a media channel to many Filipinos, it is a way of life. It is part of Filipino culture. Even today's so-called Generation X still finds radio "in" despite competition from the Internet and MTV. Consider these: The RX Concert Series features live performances by renowned bands and artists — broadcast live from the radio station's studio itself. Generation RX presents viewpoints on various issues from the pop generation who send their [opinions] via telephone, pager, and recently text messages. Both programs explain why radio listening is still a favorite past time of many young audiences.
>
> The fact that radio uses the local language or dialect makes it the most accessible channel to the Filipino *masa*.[67]

During the height of the United States' physical, political, social, and cultural colonization of this country,[68] radio's role in popularizing Philippine music cannot be understated:

> The American community generally regarded radio as an effective medium for the Americanization of the Philippines, which was an expressed colonial goal. However, American station managers sensed an appetite for Filipino elements in the programming when advertising for Tagalog programs began to increase, so the goal of Americanization came into conflict with the demands of making a profit. As businessmen, station owners and managers understood that satisfying the preferences of listeners created the critical mass of audiences that advertisers sought, which by the early 1930s had become the most important source of income of radio stations. Listeners mailed their requests for musical numbers not only in Tagalog but also in other Philippine languages, and it became the job of the broadcasting manager to find individuals who could perform the requested numbers.
>
> Local songs began to be heard on the air as early as 1929. The director of the National Library Teodoro M. Kalaw wrote that the frequent airplay of local songs increased their popularity to a point where the music sheets of kundiman outsold those of jazz. Kalaw praised radio for what it had done to revive the popularity of Philippine songs and the consequent flowering of local music such as kundiman, balitaw—an extemporaneous poetic debate between a man and a woman that is sung and danced simultaneously—and folk songs. . . . Some of the more memorable Tagalog compositions that gained wide acceptance through radio were "Dahil sa Iyo" (Because of You), "Ang Tangi Kong Pag-Ibig" (My Only Love), and "Maala-ala Mo Kaya?" (Do You Remember?).[69] (Citations omitted)

Incidentally, that period in radio's history also illustrates the difference between public performance and communication to the public of musical compositions: Philippine songs during American colonial times were

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67 Id.

68 Carrol Atkinson, *Radio Used as an Educational Tool in the Philippine Islands*, 25 MODERN LANGUAGE JOURNAL NO. 9 675, 675–676 (1941); Doreen G. Fernandez, *Mass Culture and Cultural Policy: The Philippine Experience*, 37 PHIL. STUD. NO. 4 488, 492 (1989).

69 Elizabeth L. Enriquez, APPROPRIATION OF COLONIAL BROADCASTING: A HISTORY OF EARLY RADIO IN THE PHILIPPINES, 1922–1946 113–114 (2008).

broadcast either as live in-studio performances or using recordings made with the burgeoning new technology of phonographic recordings.[70]

When we characterize the usual use of radio as a vehicle for copyright infringement, we greatly diminish its role as a vital medium in the social life of this nation, one that has helped shape great movements in our history[71] and is integral to the development of a common yet diverse national identity.[72] We impose on radio a scheme of requirements for broadcasting musical works unsupported by law, and on its audience a listening experience fraught with paranoia and uncertainty. At worst, we punish radio for the qualities intrinsic to it as a medium. To avoid further pursuit by petitioner and other collecting societies, those living and working in public spaces may simply turn off their radios, to the detriment of the creator, the medium, and the public.

ACCORDINGLY, I vote to **DENY** the Petition for Review on Certiorari. The April 19, 2017 Decision and August 3, 2017 Resolution of the Court of Appeals in CA-G.R. CV No. 105430 are **AFFIRMED**. Respondent Anrey, Inc. committed no copyright infringement in this case.

MARVIC M.V.F. LEONEN
Senior Associate Justice

CERTIFIED TRUE COPY

MARIA LUISA M. SANTILLA
Deputy Clerk of Court and
Executive Officer
OCC-En Banc, Supreme Court

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70 Id. at 114.

71 See Elizabeth L. Enriquez, *Media as Site of Social Struggle: The Role of Philippine Radio and Television in the EDSA Revolt of 1986*, 3 PLARIDEL NO. 2 123 (2006).

72 Ernesto I. Songco, *Broadcasting in the Philippines: involvement in development*, MEDIA ASIA 218 (1978).